

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MS BRIGHTON LLC,

Petitioner-Appellee,

v

CITY OF BRIGHTON,

Respondent-Appellee.

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UNPUBLISHED

April 21, 2015

No. 319909

Michigan Tax Tribunal

LC No. 00-345507

Before: BORRELLO, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

In this property valuation case, respondent appeals by right the Tax Tribunal's final opinion and judgment concerning the valuation of petitioner's parcel for the 2008, 2009, 2010, 2011, and 2012 tax years. For the reasons set forth in this opinion, we affirm.

**I. BACKGROUND**

Respondent challenges the Tax Tribunal's "true cash" valuation of the subject property. The property at issue, tax I.D. No. 4718-24-300-019, is an irregular piece of property, consisting of approximately 52.79 acres, with a relatively narrow 1,400 foot access on the west side of the property for ingress and egress. The parties agree that, due to the length of the egress, under respondent's ordinance, Brighton Municipal Code, Chapter 80, Section 100(a)(2) [ordinance 80-100(a)(2)], the property cannot be developed using a dead-end or cul-de-sac, but must instead use a loop, or circle road.

Respondent levied property tax assessments against the subject property along with an adjoining parcel, tax I.D. No. 4718-24-300-016, and petitioner, through its initial petition and subsequent amendments, challenged the assessments for the properties for tax years 2008 through 2012. The parties disagreed as to whether the Tribunal, when determining the true cash value of the subject parcel, was required to do so only in reference to the existing ordinance, or whether it could review the issue and include in its calculations the value of the property assuming the issuance of a variance to allow petitioner to utilize a more feasible cul-de-sac roadway.

While the Tribunal found that valuation of the property as future commercial development was legally permissible given the property's current zoning, it agreed with petitioner's arguments concerning the infeasibility of using the property for such development

after finding that the cost to construct a loop road would be prohibitive. The Tribunal determined that, although the gross value of the property was worth approximately \$1,478,400 as commercial property, in order to actually use the property, petitioner would be forced by the existing ordinance to construct a loop road at a cost of approximately \$3.1 to \$3.4 million, which would negate the gross value. The Tribunal did not agree with respondent's argument that the Tribunal could find the grant of a variance to be so likely that it should have been included in the Tribunal's calculations concerning the highest and best use of the property. Because the Tribunal found that use of the property for commercial purposes was not financially feasible, it determined that the highest and best use of the property was recreational/future development use, and determined the true cash value of the parcel to be \$264,000 for the disputed tax years, rather than the over \$2 million respondent's expert had initially proposed. Respondent now appeals this portion of the Tribunal's judgment.

## II. ANALYSIS

Respondent argues that the Tax Tribunal erred when it analyzed the parcel's "worst" use, as recreational/future development, rather than its best use, for commercial purposes. Respondent contends that the basis for the Tribunal's error was its decision not to take into account the likelihood that petitioner would be granted a zoning variance for the placement of a road with a cul-de-sac, rather than the required loop road, and then valuing the property as if such a variance would be granted if requested.

Absent fraud, this Court's review of a Tax Tribunal decision is limited to determining whether the Tribunal erred as a matter of law or adopted a wrong legal principle. *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 43; 572 NW2d 232 (1997). The Tribunal's factual findings are conclusive if supported by competent, material, and substantial evidence on the whole record. *Id.* Substantial evidence is more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence. *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). Failure to base a decision on competent, material, and substantial evidence constitutes an error of law requiring reversal. *Id.*

The Michigan Constitution provides that real property is to be taxed on the basis of its true cash value. See Const 1963, art 9, § 3. "'Highest and best use' is a concept fundamental to the determination of true cash value. It recognizes that the use to which a prospective buyer would put the property will influence the price which the buyer would be willing to pay." *Edward Rose Bldg Co v Independence Twp*, 436 Mich 620, 633; 462 NW2d 325 (1990).

MCL 211.27(1) provides, in pertinent part, that "'true cash value' means the usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." In determining true cash value, the assessor must consider the "existing use" of the property. MCL 211.27(1). However, this Court has held that this does not preclude consideration of other potential uses, in particular "where such [current] use bears no relationship to what a likely buyer would pay for the property[.]" *Detroit Lions, Inc v City of Dearborn*, 302 Mich App 676, 698; 840 NW2d 168 (2013). This does not mean, however, that the existing use cannot be used to determine the property's usual selling price. *Id.* "A highest and best use determination 'requires simply that

the use be legally permissible, financially feasible, maximally productive, and physically possible.” *Id.* at 697 (quotation marks omitted). “The taxpayer bears the burden of proof with respect to the true cash value of property.” *Georgetown Place Coop v City of Taylor*, 226 Mich App 33, 43; 572 NW2d 232 (1997).

It is the “legally permissible” portion of the evaluation where respondent’s argument fails. Respondent does not challenge the “gross” valuation of the subject parcel at \$1,478,400, but instead challenges the Tribunal’s determination that the property could not be feasibly developed as commercial property due to the requirements of respondent’s ordinance concerning what type of road would have to be constructed for ingress and egress. While the Tribunal reviewed this issue in terms of whether development was financially feasible, this determination was based on the Tribunal’s underlying decision concerning the legal use of the property and whether petitioner would be required to construct a more expensive loop road for access in order to commercially develop the property.

“A land use variance is, in essence, a license to use property in a way that would not be permitted under a zoning ordinance.” *Frericks v Highland Twp*, 228 Mich App 575, 582; 579 NW2d 441 (1998). There are two types of variances, as discussed by *Nat’l Boatland v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985):

Variances fall within one of two categories: use variances or non-use variances. Use variances permit a use of the land which the zoning ordinance otherwise proscribes. Non-use variances are not concerned with the use of the land but, rather, with changes in a structure’s area, height, setback, and the like. *Heritage Hill Ass’n, Inc v Grand Rapids*, 48 Mich App 765, 768; 211 NW2d 77 (1973). Non-use variances also include “the right to enlarge nonconforming uses or alter nonconforming structures.” 3 Rathkopf, *The Law of Zoning and Planning*, (4th ed, 1979) p 38–1.

As discussed in *Frericks*, the latter type, which *Frericks* also refers to as “dimensional” variances, are treated the same so far as “each allows landowners to use land in a manner that would not otherwise be permitted under a strict application of the zoning ordinance.” *Frericks*, 228 Mich App at 583. Thus, the grant of either type of variances is permissive, see MCL 125.3604, and without the grant of such a variance, a use of the property contrary to that for which it is currently zoned or otherwise restricted is not a “legal” use.

Here, the Tribunal’s refusal to consider a potential use variance in valuing the property did not amount to a legal or factual error.

First, the Tribunal’s determination is supported by the language in the enabling ordinance and in respondent’s own ordinance. Under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, a township’s zoning board of appeals (ZBA) is a municipal administrative body charged with the power to interpret the ordinance, hear appeals, grant variances, and perform various other functions that may arise in the administration of the zoning ordinance. MCL 125.3601(1); MCL 125.3603(1); *Sun Communities v Leroy Twp*, 241 Mich App 665, 670; 617 NW2d 42 (2000). As to the instant case, MCL 125.3604(7), which governs appeals to the ZBA, provides in pertinent part as follows:

If there are practical difficulties for nonuse variances as provided in [MCL 125.3604(8)] or unnecessary hardship for use variances as provided in [MCL 125.3604(9)] in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals *may* grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act. [Emphasis added.]

Contrary to respondent's argument, the fact that variances *may* be granted does not equate to a finding that such a variance must be or likely will be granted upon request.

Moreover, respondent's ordinance does not support a finding that a variance was likely to be granted in this case. The ordinance provides in pertinent part as follows:

(a) The commission<sup>[1]</sup> *may* recommend a variance from these regulations when, in its judgment, undue hardship may result from strict compliance. In granting any variance, the commission shall prescribe only conditions that it deems necessary to or desirable for the public interest. In making its findings as required herein, the commission shall take into account the nature of the proposed use of land and the existing use of land in the vicinity, the number of persons to reside or work in the proposed site and the probable effect of the proposed development upon traffic conditions in the vicinity. No recommendation for variance shall be granted *unless* the commission finds:

(1) That there are special circumstances or conditions affecting such property in that the strict application of the provisions of this article would *deprive the applicant of the reasonable use of his land.*

(2) That the recommended variance is *necessary* for the preservation and enjoyment of a substantial property right of the petitioner.

(3) That the granting of the variance *will not be detrimental to the public welfare* or injurious to other property in the territory in which such property is situated. [Brighton Municipal Code, Chapter 82, Section 82-99 (emphasis added).]

The highlighted language indicates the ordinance is permissive in nature rather than mandatory; it is also subject to a wide degree of interpretation to the extent one could reasonably argue that it involves unfettered discretion.

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<sup>1</sup> The "commission" in this ordinance refers to the planning commission. Brighton Municipal Code, Chapter 82, Section 82-99(b).

In short, both the language of the ordinance and MCL 125.3604(7) support the Tribunal's conclusion that the issuance of a variance was too tentative to be used when valuing the parcel's highest and best use. Respondent has presented no contrary authority for the proposition that subject parcels should be valued based on speculation that a variance will be approved at some point in the future.

In addition, testimony from one of petitioner's experts, Gary Tressel, supported the Tribunal's determination. Tressel testified that in this case the cul-de-sac road to the buildable portion of the site would have to be 2,800 feet long and he had never seen a variance approved for this length. Tressel stated that, in his experience, cul-de-sac length variances are not typically granted unless there exists a second "emergency connection" of egress for police and fire trucks. Tressel stated that due to the topography of the property and its location, such a second ingress would require "major, major development costs."

In contrast, respondent's expert, Gary Markstrom, testified that he would recommend a variance for his calculated 1,400-foot boulevard road due to the fact that a circle road would be cost prohibitive and would be more detrimental to the natural features on the east side of the site. He also testified that his experience with the city was that Brighton was pro-development and was trying to facilitate development. However, respondent has not shown that Markstrom's testimony would be relevant to deciding the likelihood of an actual grant of a variance by the planning commission and city council or in addressing the other concerns listed in the ordinance—in particular the safety concerns and possible objections by the fire department that Tressel and a real estate appraiser testified about.

For these reasons, respondent's argument that the Tribunal was required to determine the highest and best use of the property as if a variance would be granted, or was highly likely to be granted, is without merit.

Respondent's additional argument that petitioner is somehow at fault for "failing" to seek a variance, in order to "artificially depress" its land value is somewhat specious. Petitioner did not set forth the restrictions contained in respondent's zoning ordinance. Moreover, petitioner was not required to develop the property to maximize its taxable value; rather, "[a]nyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Helvering v Gregory*, 69 F2d 809, 810-811 (CA 2, 1934).

Affirmed. No costs awarded. MCR 7.219(A).

/s/ Stephen L. Borrello  
/s/ Amy Ronayne Krause  
/s/ Michael J. Riordan